IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID W. GUNDERSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

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ISSUES PRESENTED

1. Whether the district court could sentence Gunderson to one-hundred years as a persistent felony offender and also sentence Gunderson to a life sentence.

2. Whether there was insufficient evidence to establish attempted sexual intercourse without consent (SIWC) when there was no evidence of attempted or intended penetration.

3. Whether Gunderson's trial counsel provided ineffective assistance.

4. Whether Gunderson was entitled to a missing evidence jury instruction as a matter of due process when the State failed to collect physical evidence.

5. Whether comments of a prospective juror indicating that Gunderson had been in jail required a mistrial.

6. Whether the district court committed plain error when it failed to remove a prospective juror for cause after she indicated bias against the accused.

7. Whether the district court committed reversible error when it declined to give an instruction that a defendant's testimony should be treated the same as any other witness.

8. Whether the district court committed plain error when it gave the jury disjunctive definitions of "purposely" and "knowingly" that defined the terms as relating either to conduct or to result.

9. Whether the district court imposed an illegal sentence when it imposed fifty-one conditions on Gunderson.

STATEMENT OF THE FACTS

At around 2:00 a.m. on July 3, 2007, Stephanie Randall (Randall) walked home to her apartment after an evening of drinking with friends at the nearby Rainbow Bar. (Trial at 122-23.) Upon arriving home, Randall went to her kitchen to make herself something to eat. (Trial at 133.) Gunderson, who was hanging out in the area drinking with a friend, thought he recognized Randall from the Rainbow Bar and knocked on Randall's front door to see whether she recognized him. (Trial at 395, 443-44.) When Randall answered the door, Gunderson asked to use her telephone. (Trial at 134, 395.) Randall, who did not recognize Gunderson as anyone she had ever seen before, answered falsely that she did not have a telephone and shut the door on Gunderson. (Trial at 134, 395.) Nothing in this brief exchange concerned or frightened Randall. (Trial at 135-36.) Randall returned to her cooking, and after she finished her food, shut off the lights in her apartment and went to her bedroom to sleep. (Trial at 136-39.) Because of the hot summer air, Randall went to bed wearing just her bottom underwear. (Trial at

137.) Gunderson, for similar reasons, was walking around that night with his shirt off and stuffed in his back pocket. (Trial at 396.)

After his brief exchange with Randall, Gunderson went back across the street to talk with his friend. (Trial at 396.) Gunderson continued to believe Randall was someone he knew, and about a half hour later he decided to go back to Randall's apartment to see again whether she would recognize him so that he could hang out with her for a while. (Trial at 396-97.) Gunderson testified that upon returning to Randall's door, he found it to be slightly ajar. (Trial at 398, 425.) Randall testified that she had shut the door but did not remember whether she had locked it. (Trial at 135.) Gunderson testified that he knocked on the open door and then stepped into the apartment and called out asking whether anybody was home. (Trial at 398, 426, 429.) Gunderson testified that he heard what sounded like a voice coming from the back of the apartment and walked in to talk with the person. (Trial at 398, 426, 429.) Gunderson then found himself in a darkened bedroom. (Trial at 398, 430-31.) Randall, who Gunderson initially thought to be a man, was sleeping on the bed, partially covered in a sheet, with her back to the doorway. (Trial at 398-99, 430.)

Gunderson testified that he then sat down on the edge of the bed to talk with Randall. (Trial at 399, 430-31.) Gunderson did not touch Randall's exposed breasts or any other sexual part of her body and emphatically denied any intent to

have sex with her. (Trial at 402, 446-47.) He denied kissing her neck or attempting to pull down her underwear. (Trial at 437-38.)

Gunderson further testified that once Randall awoke, he did not stop her from getting up and that they did not struggle on the bed. (Trial at 400, 402.) Once off of the bed, Randall took Gunderson's shoes from the bedroom floor and threw them out the front door while continuing to angrily demand that Gunderson leave. (Trial at 400-01.) Gunderson testified he complied and started walking to the front door, while trying to talk Randall into calming down. (Trial at 401.) However, upon reaching the door, Gunderson noticed that his shirt had fallen out of his back pocket and so headed back towards to the kitchen hallway to pick it up. (Trial at 401.) Gunderson testified that while he was retrieving his shirt, Randall grabbed him and scratched his neck. (Trial at 401, 440.)

Randall testified as to events in the bedroom that she "woke up to somebody getting in my bed and touching me and kissing me." (Trial at 140.) She testified that the person, whom she later identified as Gunderson, kissed her on her "neck area" and that he was "rubbing" her thigh. (Trial at 140.) She told the jury that Gunderson also "was trying to pull my underwear off," that "he grabbed the side of it and was pulling down on it," and that "he had it in his hand, he had grabbed onto it . . . with his hands, with his whole hand." (Trial at 140-41.) Randall testified that Gunderson "was pretty intent in pulling it [her underwear] off" and that he

would have been able to get it off had she not grabbed his hand and resisted. (Trial at 142.) Randall did not know whether her underwear was pulled with sufficient force to rip it or permanently stretch it. (Trial at 163-64.) She did not have any scratch marks on her hip. (Trial at 164.) Randall also testified that before she was able to kick him away and get off of the bed, Gunderson briefly pinned her arms down on the bed while telling her "to knock it off and calm down and saying that I invited him in." (Trial at 143-44.) She did not have any bruises or injuries on her arms or anywhere else. (Trial at 164, 208.)

Randall testified that after "several minutes" struggling on the bed she was able to get up and turn on the bedroom light. (Trial at 144-46.) She testified that she then recognized the man in her bedroom as the man who had previously asked to use her telephone. (Trial at 144-45.) Both in the courtroom and through a photo array, Randall identified the man in her bedroom as Gunderson. (Trial at 158, 210-11.) Once up, Randall scratched Gunderson and "had him by the hair and was trying to drag him out by his hair." (Trial at 147.) Randall testified that Gunderson was concerned about retrieving his shirt and shoes and that she picked up his shoes and threw them out the front door. (Trial at 147-48.) She testified that when she went to do this, she had to unlock the door, indicating that if Gunderson came in through the front door, he locked it behind him. (Trial at 151.)

On cross, Randall confirmed that Gunderson never had his pants off, never exposed his penis, never touched her exposed breasts, never put his hand inside her underwear, never hit her, and never threatened her. (Trial at 165-68.) Although Randall testified at trial that "just rubbing my leg and pulling on my underwear is pretty sexual to me," she acknowledged that she had previously given an interview to police in which she had agreed that there had been "no sexual contact." (Trial at 167-68.) She also acknowledged that Gunderson was on his way out of her apartment when he went back for his shoes and shirt and that she "was clawing at him and pulling his hair" at that time. (Trial at 169-70.)

After Gunderson left her apartment, Randall called a friend, Darrell Jager (Jager). (Trial at 149, 174.) Jager testified that Randall had called him around 2:30 to 3:00 a.m. on July 3, 2007. (Trial at 174.) Jager described Randall as "crying and somewhat hysterical." (Trial at 174.) He told her to call the police. (Trial at 175.) Randall then called 911 and reported the incident. (Trial at 149, 153-54; State's Ex. 8.)

Officer Shawn Wichman (Wichman) was in charge of Billings police's initial response to Randall's apartment. (Trial at 181.) Upon his arrival Wichman interviewed Randall. (Trial at 182.) He testified that she was "very distraught" and visibly shaking during the interview. (Trial at 182.) Wichman did not observe any injuries on Randall. (Trial at 189-90.) Although Wichman examined

Randall's bed, he did not take Randall's bedding into evidence. (Trial at 190-91, 194-95.) Nor did Wichman take Randall's underwear into evidence. (Trial at 193.) Wichman did, however, transport Randall to the Billings Police Department for a detective to take samples of the dried blood on her hand and under her fingernails. (Trial at 191.) The blood evidence was collected by Detective Paharik, and subsequently identified by the Montana Crime Lab as belonging to Gunderson. (Trial at 201-06, 371-78.) The Detective did not attempt to collect a saliva sample from the area where Randall indicated that Gunderson had kissed her neck. (Trial at 212.)

Randall initially described Gunderson to police as a thin, white male in his forties with red hair, approximately 5'10", and wearing bright white tennis shoes and T-shirt. (Trial at 150, 181, 227; State's Ex. 8.) Officer Brad Ross (Ross), responding to a dispatch arising out of Randall's 911 call, encountered Gunderson walking a few blocks from Randall's apartment with another man. (Trial at 225.) Ross stopped Gunderson on account of Gunderson meeting the suspect's general description, having red scratch marks on his neck, bright white shoes, and wearing a T-shirt. (Trial at 226-27.) Gunderson was sweating and the scratches on his neck had fresh, wet blood. (Trial at 228-29.) The time of the stop was 3:18 a.m. (Trial at 234.)

Gunderson did not try to run from Ross and when approached, gave his correct name and address. (Trial at 246-47.) Gunderson initially told Ross that he received the scratch mark on his neck during a bar fight at the Crystal Lounge. (Trial at 229.) Gunderson consented to a portable breath test and blew at 0.086. (Trial at 230-31.) Ross advised Gunderson of his *Miranda* rights, and Gunderson agreed to be interviewed. (Trial at 233.) Gunderson told Ross that after the bar fight at the Crystal Lounge, he had been hanging out at the Rescue Mission until right before Ross stopped him. (Trial at 233.) The man with whom Gunderson had been walking testified at trial that he had only met Gunderson a few minutes before being stopped and that Gunderson had also told him that he had been in a fight at the Crystal Lounge. (Trial at 287-89.) Gunderson told Ross that he had been asked to leave the Crystal Lounge by one of the staff and that he had arrived at the Crystal Lounge that night by taking a taxi that he then jumped out of without paying. (Trial at 234.) Gunderson denied entering any residences without authorization and said that his DNA would not be present at any residential crime scene. (Trial at 235-36.) The interview was recorded and admitted into evidence at trial. (Trial at 237-38; State's Ex. 19.)

At trial, Gunderson acknowledged that his statement regarding being injured in a bar fight was untrue and testified that he had been in Randall's apartment. (Trial at 405, 426.) Gunderson maintained, however, that he had been asked to

leave the Crystal Lounge by staff that night and that he had in fact taken a cab to the Crystal Lounge and then jumped out without paying. (Trial at 407, 409.) The State introduced testimony from the bouncer working the Crystal Lounge that night that he did not remember kicking Gunderson or anyone else out. (Trial at 294, 302.) The State also introduced testimony from the owners of the two taxi companies in town that their company records did not indicate anyone being dropped off at the Crystal Lounge during the relevant time and did not indicate any unpaid fares that night. (Trial at 277, 310-11.)

STATEMENT OF THE CASE

On July 19, 2007, the State charged Gunderson by information in the Thirteenth Judicial District Court with burglary and attempted SIWC. (D.C.Doc. 3.) The burglary charge alleged that Gunderson unlawfully entered Randall's residence with the purpose to commit sexual assault. (D.C.Doc. 3.) The attempted SIWC alleged that Gunderson "climbed into [Randall's] bed, tried to pull her underwear down, and kissed her neck while she slept" with the purpose to commit SIWC. (D.C.Doc. 3.) Gunderson was arrested on July 3, 2007, and remained in custody throughout the proceedings. (D.C.Doc. 84 at 1.) The Office of the Public Defender initially assigned Matt Claus to represent Gunderson but reassigned the case to Robert Kelleher on August 30, 2007. (D.C.Doc. 14.)

On July 30, 2007, and October 19, 2007, the State filed notices of intent to seek Gunderson's designation as a persistent felony offender. (D.C.Docs. 8, 24.) The State also filed a *Just* notice seeking to use Gunderson's 1995 SIWC conviction. (D.C.Doc. 21.) Although the district court granted the State's request (D.C.Doc. 48 at 3), at trial the State did not introduce any evidence regarding Gunderson's prior convictions. (Trial at 267-68, 271.)

On February 15, 2008, Gunderson filed a motion to dismiss for loss of evidence. (D.C.Doc. 51.) The motion argued that because police failed to collect Randall's bedding and failed to perform a rape kit exam of Randall for injuries the case should be dismissed. (D.C.Doc. 51.) The district court orally denied the motion on the first day of trial. (Trial at 8.) In the alternative, Gunderson sought a jury instruction relating to this alleged spoilage of evidence. (D.C.Doc. 51 at 3; Trial at 5-6, 452-58.) The district court declined to give such an instruction. (Trial at 459.)

The jury trial in this case began on February 19, 2008. (Trial at 1.) The trial had initially been scheduled for December 4, 2007, but had been continued upon defense motion. (D.C.Docs. 30-31.) The record on appeal does not explain why both this defense motion and the district court's order vacating were dated and filed after the initial December 4, 2007, trial date. (*See* D.C.Docs. 30-31.)

During *voir dire*, one of the potential jurors, Thorson, indicated that he worked at the Yellowstone County Detention Facility. (Trial at 17.) When asked by the prosecutor, "Are you familiar with Mr. Gunderson?" Thorson affirmed that yes, he was. (Trial at 17.) Based on this exchange Gunderson moved for a mistrial on the ground that Thorson's comments had tainted the jury pool by indicating that Gunderson was or had been in jail. (Trial at 104-05.) The district court denied this motion. (Trial at 106.) The State removed Thorson through a preemptory challenge. (Trial at 107.)

During *voir dire* there were two challenges for cause, and the district court excused both of the challenged jurors. (Trial at 36, 75.) Defense counsel questioned a third potential juror, Jensen, at length regarding her thoughts that she would "probably have more of a bias that [Gunderson] is [guilty] simply because he's charged." (Trial at 78.) Jensen later indicated that she thought she could be fair. (Trial at 79.) Defense counsel did not challenge Jensen for cause and instead removed her with a preemptory. (*See* Trial at 79, 104, 106.)

At the start of the second day of trial, Gunderson requested to speak with the district court regarding his counsel's performance. (Trial at 254.) The district court met with Gunderson and defense counsel outside of the State's presence. (Trial at 254-55.) Gunderson expressed concerns that defense counsel failed to properly impeach Randall with her prior statement, failed to investigate and call as

a witness the cab driver that drove Gunderson to the Crystal Lounge, failed to communicate with Gunderson in a timely manner, failed to alert Gunderson that the State had photos showing blood on Randall's hand, and failed to call Gunderson's nephew as a witness regarding the cab and events at the Crystal Lounge. (Trial at 255-58, 261-62, 264-65.) Gunderson indicated that although he had not previously raised these concerns to the district court, he had for months been expressing his concerns to counsel and had written several letters to managers within the Office of the Public Defender. (Trial at 256-57, 259-60.)

The district court asked defense counsel whether there was anything he wanted to say. (Trial at 257.) Defense counsel indicated that he was still in the process of attempting to locate a bouncer at the Crystal Lounge who recognized Gunderson and a cab driver who matched Gunderson's description. (Trial at 257-58.) With respect to cross examination of Randall, defense counsel expressed his understanding that Gunderson's main concern was that defense counsel did not attempt to impeach Randall's testimony that Gunderson had pulled one side of her underwear down several inches with her prior statement that she had made sure her underwear stayed on and were not pulled down. (Trial at 260-61.) Defense counsel opined that any inconsistency between these two statements was "de minimis." (Trial at 261.)

The district court's only questions to Gunderson sought to establish that Gunderson had not previously raised these issues to the district court and to clarify to which portion of Randall's cross-examination Gunderson was referring. (Trial at 259, 261.) The district court then asked Gunderson what he wanted the district court to do at this stage in the proceedings, and the following exchange occurred:

> MR. GUNDERSON: I don't want to waive no rights.
>
> THE COURT: Well, okay. What does that mean? I don't--are your waiving rights doing or not doing something now?
>
> MR. GUNDERSON: If I ask for him to be dismissed in representing me, we've got to start over, huh?
>
> THE COURT: Well, that's a possibility if I were to rule that Mr. Kelleher's actions were so ineffective as to trigger relief under whether it's State versus Finley or Strickland, or cases related to that for ineffective assistance of counsel. If--and that's what I'm interpreting you to say.
>
> MR. GUNDERSON: Yeah, I was just--I'm--
>
> THE COURT: Go ahead.
>
> MR. GUNDERSON: I leave the decision up to you.
>
> THE COURT: Okay. Well, here's what I'm going to do. I--
>
> MR. GUNDERSON: Because I feel he's ineffective.
>
> THE COURT: Okay. Well, I am not going to replace Mr. Kelleher. I'm not going to declare a mistrial or to remove him. I guess the only relief I would give you, if you want to do it, but I would strongly urge you not to, is to let you defend yourself and have Mr. Kelleher on as standby. To do that in the middle of the trial would, I think, create all sorts of issues and questions and negative connotations to the jury. So

> I--as well as putting you in a difficult position acting as your own attorney. So I would strongly urge you not to do that.

(Trial at 262-63.)

The district court indicated to Gunderson that based on the State's trial evidence and representations it appeared that it would be difficult for defense counsel to find a witness to testify that Gunderson had taken a cab to the Crystal Lounge and had then been bounced out of that bar. (Trial at 264.) Defense counsel indicate that he too had "difficulty" with the idea of finding the cab driver described by Gunderson as the cab company records did not indicate such a ride occurred. (Trial at 265.) The district court then inquired of defense counsel whether he was close to tracking down any of these witnesses and whether he needed "some time." (Trial at 266.) Defense counsel indicated he had a lead and was still trying to find the cab driver, and the district court responded that if defense counsel could locate him before the end of the trial, the district court would accommodate his testimony within the trial's schedule. (Trial at 266.) Gunderson then indicated that another witness who could testify to Gunderson's whereabouts approximately fifteen minutes before the cab ride was presently in the county jail. (Trial at 267.) The district court responded that Gunderson and defense counsel would need to discuss the tactical ramifications of calling this person as a witness. (Trial at 267.) The district court concluded the conversation

with "I'm not going to remove Mr. Kelleher. I don't think that the things that you have stated have risen to the level of removing him." (Trial at 268.)

Following the close of the State's case-in-chief, defense counsel made a motion to dismiss for insufficient evidence. (Trial at 380-81.) The district court denied the motion. (Trial at 382.)

Gunderson was the only witness called to testify for the defense. (*See* Trial at 392, 449.) The district court made no further inquiry of defense counsel regarding why none of the witnesses identified and requested by Gunderson were called. The record contains no other discussion of Gunderson's complaints regarding defense counsel and no other inquiries by the district court.

During the settling of jury instructions, defense counsel made no objection to any of the State's offered instructions. (Trial at 451, 459.) Defense counsel did offer two instructions that were opposed by the State and declined by the district court. (Trial at 451-59.) The first sought to instruct the jury to treat the defendant's testimony "just as you would the testimony of any other witness." (D.C.Doc. 58.) The second sought to instruct the jurors that they could infer from the State's failure to preserve evidence that the missing evidence would have been adverse to the State's case. (D.C.Doc. 58.)

Following the district court's instruction of the jury (D.C.Doc. 59; Trial at 464), opposing counsel offered closing arguments. Neither side made any

objection to the other's closing. (*See* Trial at 465-513.) The jury returned guilty verdicts on both counts. (D.C.Doc. 63-64; Trial at 514.) The district court then ordered a presentence investigation and a sexual offender evaluation. (D.C.Doc. 76; Trial at 518-19.)

Prior to sentencing, defense counsel filed a motion for a new trial and brief in support. (D.C.Docs. 66-67.) The motion argued that a new trial was warranted because of the district court's refusal to give the defendant's two proposed jury instructions, because of jury taint from prospective juror's comments indicating that Gunderson was or had been in jail, because of the State's failure to present sufficient evidence to convict, and because of cumulative error. (D.C.Docs. 66-67.) The district court heard oral argument on the motion and then denied it. (D.C.Doc. 77; 5/23/08 Tr.)

At sentencing, defense counsel indicated several factual disagreements with the presentence investigation's criminal history report but made no other objections to the sentence or its conditions. (6/16/08 Tr. at 3-4.) The district court sentenced Gunderson to one-hundred years in prison as a persistent felony offender on the burglary and life in prison consecutive on the attempted SIWC, both to be served without the possibility of parole. (6/16/08 Tr. at 23-24.) The district court also designated Gunderson as a Level 3 sexual offender as recommended by the evaluator's report. (6/16/08 Tr. at 22, 25.) The district court made oral findings

and stated its reasons for imposing these sentences. (6/16/08 Tr. at 12-26.) The district court also summarized these findings and reason in its written judgment and attached a written transcript of its oral findings and reasons to the judgment. (D.C.Doc. 86.)

Gunderson filed a timely notice of appeal to this Court.

SUMMARY OF THE ARGUMENT

Gunderson was convicted of felony burglary and attempted sexual intercourse without consent. Even taking the facts in the light most favorable to the prosecution, Gunderson entered the alleged victim's home, kissed her neck and pulled on her underwear. Following a brief struggle, Gunderson left. There is no allegation that any physical injury or actual sexual contact occurred. Gunderson received a sentence of life plus one-hundred years without the possibility of parole.

Gunderson asserts the following bases of appeal: 1) once the district court sentenced Gunderson to one-hundred years as a persistent felony offender, the district court could not also sentence Gunderson to a life sentence; 2) there was insufficient evidence to establish attempted SIWC because there was no evidence of attempted or intended penetration; 3) Gunderson's trial counsel provided ineffective assistance; 4) Gunderson was entitled to a missing evidence jury instruction as a matter of due process because the police failed to make reasonable efforts to conduct a rape exam or to collect other physical evidence; 5) comments

of a prospective juror indicating that Gunderson had been in jail required a mistrial; 6) the district court committed plain error when it failed to remove a prospective juror for cause after she indicated bias against the accused; 7) the district court committed reversible error when it declined to give an instruction that a defendant's testimony should be treated the same as any other witness; 8) the district court committed plain error when it gave the jury disjunctive definitions of "purposely" and "knowingly" that defined the terms as relating either to conduct or to result; and 9) the district court imposed an illegal sentence when it imposed fifty-one conditions on Gunderson.

STANDARD OF REVIEW

This Court reviews a district court's sentence for legality only. *State v. Vernes*, 2006 MT 32, ¶27, 331 Mont. 129, 130 P.3d 169.

"A District Court's conclusion as to whether sufficient evidence exists to convict is ultimately an analysis and application of the law to the facts, and as such is properly reviewed de novo." *State v. Swann*, 2007 MT 126, ¶19, 337 Mont. 326, 160 P.3d 511. The standard of review of sufficiency of the evidence on appeal is whether, upon viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Rennaker*, 2007 MT 10, ¶16, 335 Mont. 274, 150 P.3d 960 (citation omitted).

Claims of ineffective assistance of counsel present mixed questions of law and fact that this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶12, 323 Mont. 6, 97 P.3d 1095.

Generally, this Court has plenary review over constitutional questions. *Wing v. State*, 2007 MT 72, ¶9, 336 Mont. 423, 155 P.3d 1224.

The standard for denial of a motion for a mistrial is whether the district court abused its discretion. *State v.Steele*, 2004 MT 275, ¶15, 323 Mont. 204, 99 P.3d 210.

When a defendant raises the plain error doctrine to request review of issues that were not objected to at the district court level, this Court's review is discretionary. *State v.Gray*, 2004 MT 347, ¶13, 324 Mont. 334, 102 P.3d 1255.

This Court reviews jury instructions in criminal cases to determine whether "the jury instructions, as a whole, fully and fairly instruct the jury on the law applicable to the case." *State v. Pol*, 2008 MT 352, ¶22, 346 Mont. 322, 195 P.3d 807; *State v. Archambault*, 2007 MT 26, ¶¶25-27, 336 Mont. 6, 152 P.3d 698.

ARGUMENT

I. ONCE THE DISTRICT COURT SENTENCED GUNDERSON TO ONE-HUNDRED YEARS AS A PERSISTENT FELONY OFFENDER, THE DISTRICT COURT COULD NOT ALSO SENTENCE GUNDERSON TO A LIFE SENTENCE.

Where a defendant is being sentenced as a persistent felony offender and has been convicted of multiple felonies in a single proceeding, "the plain language of

§48-16-502(2), MCA, prohibit[s] a term of imprisonment of more than 100 years." *State v. Gaither*, 2009 MT 391, ¶54, __ Mont. __, __ P.3d __. Gunderson was sentenced as a persistent felony offender and in violation of Mont. Code Ann. §48-16-502(2), received a term of imprisonment in excess of one-hundred years. Specifically, Gunderson received a one-hundred year sentence as a persistent felony offender for burglary and received a consecutive life sentence for attempted SIWC. Pursuant to this Court's holding in *Gaither*, Gunderson's sentence is illegal and must be remanded to the district court for resentencing.

II. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH ATTEMPTED SIWC BECAUSE THERE WAS NO EVIDENCE OF ATTEMPTED OR INTENDED PENETRATION.

"A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act towards the commission of such offense." Mont. Code Ann. §45-4-103(1) (2007). There is an obvious difficulty with punishing for crimes that were never actually committed. The critical question with respect to an attempt, is how far towards commission of the actual crime does a person have to go to be punished as if he or she had actually committed the crime. Obviously, mere thought or mere preparation is not sufficient. Additionally, not all acts towards commission of a crime are sufficient. Rather, there must be an "overt act" that "reach[es] far enough towards the accomplishment of the desired result to amount to the commencement of the

consummation." Moreover, "there must be at least some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." *State v. Mahoney*, 264 Mont. 89, 97, 870 P.2d 65, 70 (1994). In the present case, even taking the facts in the light most favorable to the prosecution, Gunderson had not crossed that line--there was no attempted penetration and therefore, no attempted SIWC.

In the context of an attempted sexual crime, it is critical to distinguish between the various offenses: sexual contact results in misdemeanor sexual assault while penetration, however slight, constitutes felony SIWC. Thus, the difference between attempted misdemeanor sexual assault and attempted felony SIWC is attempted penetration. Even taking the facts in the light most favorable to the prosecution, Gunderson did not attempt penetration; he attempted (and arguably completed) sexual contact. Moreover, there are no facts that establish that Gunderson's intent was penetration --he did not attempt penetration, his pants were on and he did not make any statements that he intended to accomplish penetration. Although the facts taken in the light most favorable to the prosecution are sufficient to establish attempted misdemeanor sexual assault, there is no evidence of attempted or even intended penetration and therefore, the facts do not establish

attempted SIWC. To hold otherwise would make every attempted or completed sexual assault an attempted SIWC.

This Court should hold that in order to constitute an attempt of the specific offense of SIWC, there must be attempted penetration or specific evidence that penetration, rather than sexual contact, was intended. Accordingly, Gunderson's conviction for attempted SIWC should be dismissed.

III. GUNDERSON'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

The Sixth Amendment to the United States Constitution and Article II, §24, of the Montana Constitution guarantee a person the right to effective assistance of counsel. To evaluate claims of ineffective assistance of counsel, this Court has adopted a two-pronged test, which requires the defendant to establish 1) counsel's performance fell below an objective standard of reasonableness; and 2) a reasonable probability exists that but for counsel's errors, the result of the proceeding would have been different. *Kougl*, ¶11.

A. Gunderson's Trial Counsel Failed to Raise an Abandonment Defense and Failed to Request Lesser-Included Offense Jury Instructions.

A person is not liable for attempt if "under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort." Mont. Code Ann. §45-3-103(4) (2007). Moreover, by statute, a defendant is entitled to a

lesser-included offense jury instruction "when there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense." Mont. Code Ann. §46-16-607(2) (2007). Trespass is a lesser-included offense of burglary. *State v. Dixon*, 2000 MT 82, ¶35, 299 Mont 165, 998 P.2d 544. Although this Court has not determined whether sexual assault is a lesser-included offense of SIWC, the Court has assumed it to be a lesser-included offense for the purposes of numerous decisions. *State v. Stevens*, 2002 MT 181, ¶54, 311 Mont. 52, 53 P.3d 356.

Even if one takes the facts in the light most favorable to the prosecution, Gunderson received a life sentence plus one-hundred years without the possibility of parole, for entering Randall's home through an unlocked door, kissing her neck and pulling on her underwear. There was never any attempted penetration, any sexual contact and there was no bodily injury. Randall describes a brief struggle after which Gunderson left. These actions support misdemeanor trespass and amounted to, at most, attempted misdemeanor sexual assault. Moreover, any attempt was voluntarily abandoned by Gunderson before there was bodily injury. Although there were facts supporting the defense of abandonment as well as the lesser-included offenses of misdemeanor sexual assault and misdemeanor trespass, Gunderson's trial counsel failed to raise the defense or request lesser-included

offense jury instructions. This constituted ineffective assistance of counsel and accordingly, this Court should reverse and remand for a new trial.

B. Gunderson's Trial Counsel Failed to Sufficiently Investigate, Call Requested Witnesses, Impeach Randall, Challenge a Biased Juror for Cause, Object to Imposition of Disjunctive Mental State Instructions and Object to Imposition of Fifty-One Conditions.

Gunderson's trial counsel was ineffective for not sufficiently investigating the case and calling requested witnesses, for not adequately impeaching Randall, for not challenging prospective juror Jensen for cause, for not objecting to the disjunctive mental state instructions, and for not objecting to imposition of the fifty-one conditions on a no-parole sentence.

Gunderson's counsel called only Gunderson as a witness, counsel was conducting basic factual investigation after the trial had commenced and clearly, never completed the investigation. Gunderson's counsel failed to properly cross-examine Randall or to make obvious objections, such as challenging an admittedly biased juror for cause, allowing disjunctive mental state jury instruction and not objecting to fifty-one conditions on a no-parole sentence. Additionally, Gunderson's counsel failed to put forth an abandonment defense or to request lesser-included offense jury instructions, although the defense and the instructions were warranted by the facts. One or two of these errors could arguably be tactical, but taken together, these actions and inactions evidence a general and blatant lack

of preparation for a very serious criminal trial. Gunderson was clearly denied effective assistance of counsel and this Court should reverse and remand for a new trial.

C. When Gunderson Alleged Ineffectiveness, it Was Error Not to Hold an Evidentiary Hearing.

When a defendant alleges to the district court that his attorney is not providing effective assistance of counsel and requests his removal, the district court must "make an adequate initial inquiry into the nature of a defendant's complaint to determine if those complaints are 'seemingly substantial.'" *Halley v. State*, 2008 MT 193, ¶16, 344 Mont. 37, 186 P.3d 859 (*quoting State v. Gallagher*, 1998 MT 70, ¶15, 288 Mont. 180, 955 P.2d 1371). "[A]n initial inquiry is adequate when the district court considers the 'defendant's factual complaints together with counsel's specific explanations addressing the complaints.'" *Halley*, ¶17 (*quoting Gallagher*, ¶15). If the complaints are "of a seemingly substantial nature," the district court must hold a full evidentiary hearing to address their validity. *Gallagher*, ¶23.

Here, Gunderson expressed concerns regarding counsel's cross-examination of Randall and previous communication failures. (Trial at 255-56.) Additionally, Gunderson informed the district court that for months he had been requesting that his attorney investigate and locate a cab driver and a bar bouncer who could corroborate portions of Gunderson's testimony regarding the evening of the

alleged offenses. (Trial at 255-58, 261-62, 264-65.) Gunderson also told the district court that his attorney had failed to subpoena several other known witnesses (Gunderson's nephew in Nevada and a friend named Brandon then in Yellowstone County Jail). (Trial at 264, 267.) Gunderson stated that he felt trial counsel was "ineffective," and the district court interpreted his complaints as a request for trial counsel's removal although Gunderson himself was not explicit in requesting a substitution of counsel. (*See* Trial at 262-63, 268.)

The district court invited trial counsel to respond to Gunderson's complaints but made no specific inquiries into why trial counsel waited until the midst of trial to investigate the cab driver and bar bouncer witnesses or into why the other identified witnesses had not been subpoenaed. Trial counsel acknowledged that he "did just yesterday have [his] investigator try to locate a bouncer at the Crystal Bar by the name of Brent." (Trial at 257.) The discussion concluded with defense counsel stating that he would continue to look for the cab driver and the district court indicating it would accommodate calling these additional witnesses on the last day of trial. (Trial at 265-66.) The district court told Gunderson of defense counsel, "I'm not going to remove Mr. Kelleher. I don't think that the things that you have stated have risen to the level of removing him." (Trial at 268.) The district court made no further inquiry into allegations of trial counsel's

investigative failings even when counsel rested his case after only calling Gunderson as a witness.

The district court failed to adequately inquire into Gunderson's allegations, in particular by making no follow-up inquiry after trial counsel called none of Gunderson's requested witnesses. Gunderson's ineffective assistance allegations were of a seemingly substantial nature and the district court erred when it did not set a full hearing regarding Gunderson's allegations. The district court applied an incorrect standard when it evaluated Gunderson's concerns to determine whether they rose to the level of requiring new defense counsel rather than applying the *Gallagher* standard of whether the concerns were seemingly substantial and, therefore, warranting of a separate hearing to address their merits. *See Gallagher*, ¶¶25-26. This Court should remand for an evidentiary hearing to determine the validity of Gunderson's complaints. *Gallagher*, ¶26.

IV. GUNDERSON WAS ENTITLED TO A MISSING EVIDENCE JURY INSTRUCTION AS A MATTER OF DUE PROCESS BECAUSE THE POLICE FAILED TO MAKE REASONABLE EFFORTS TO CONDUCT A RAPE EXAM OR TO COLLECT OTHER PHYSICAL EVIDENCE.

Gunderson's convictions, for both burglary and SIWC, unnecessarily hinged on a he-said-she-said credibility duel. The alleged victim stated that Gunderson kissed her neck, forcefully pulled on her underwear and that she and Gunderson struggled on the bed. Despite the fact that physical evidence could have

corroborated or refuted critical elements of the alleged victim's story, the police failed to collect the bedding, collect the victim's underwear or to collect evidence that could have established or refuted the presence of saliva on Randall's neck. Based on the missing evidence, Gunderson's defense counsel made a motion to dismiss and requested a missing evidence jury instruction. The district court denied the motion to dismiss and failed to give the requested jury instruction. At the very least, the Due Process Clause of the Montana Constitution requires that Gunderson be given a missing evidence jury instruction.

A. Pursuant to the Due Process Clause of the Montana Constitution, this Court Should Reject the Federal Bad Faith Standard Set Forth in *Arizona v. Youngblood* and Should Reject the Rule That the Police Have No Duty to Gather Evidence.

In a case currently before this Court, *State v. Taylor*, Sup. Ct. Cause No. DA 09-0246, Appellant Taylor argues that pursuant to the Due Process Clause of the Montana Constitution this Court should reject the federal "bad faith" standard set forth in *Arizona v. Youngblood*, 488 U.S. 51 (1988), and should reject the anachronistic rule that there is no duty to gather evidence set forth in cases such as *State v. Swanson*, 222 Mont. 357, 360-62, 722 P.2d 1155, 1157-58 (1986) (*citing In re Martin*, 374 P.2d 801 (Cal. 1962)). Gunderson joins and hereby incorporates Taylor's arguments. It should be noted, however, that unlike Taylor, Gunderson is not raising the issue pursuant to the plain error doctrine. Gunderson's trial counsel

did make a motion to dismiss based on the missing evidence and did request a missing evidence jury instruction.

For the reasons set forth by Taylor, this Court should explicitly reject the federal "bad faith" standard set forth in *Youngblood*. With respect to missing evidence with potential exculpatory value, this Court should adopt the balancing test advocated by Taylor and set forth in *Hammond v. Delaware*, 569 A.2d 81 (1989). Moreover, based on the rationale set forth by Taylor, this Court should reject the rule that the police have no duty to gather evidence. Pursuant to the balancing test set forth in *Hammond*, this Court should hold that, at the very least, Gunderson was entitled to a missing evidence jury instruction and the district court erred in proposing such an instruction.

B. The State's Failure to Gather Evidence in the Present Case Required a Missing Evidence Jury Instruction as a Matter of Due Process.

The constitutional guarantee of due process includes a right of access to evidence. *Youngblood*, 488 U.S. at 55. Because it implicates fundamental fairness, "the . . . right of access to evidence partakes of both procedural and substantive due process." *Harvey v. Horan*, 285 F.3d 298, 318 (4th Cir.2002) (J.Luttig, respecting denial of rehearing *en banc*). This Court has decided numerous "access to evidence" cases, but has never considered the contours of Montana's Due Process Clause with respect to the right of access to evidence.

As this Court recently noted, pursuant to the due process guarantee of the United States Constitution, where "lost evidence is . . . potentially exculpatory, rather than apparently exculpatory, the defendant must show bad faith by the State in order to establish a due process violation." *State v. Giddings*, 2009 MT 61, ¶¶47-48, 349 Mont.347, 208 P.3d 363 (*citing Youngblood*, 488 U.S. at 57-58). Although *Giddings* correctly enunciates the current federal "bad faith" standard, this Court has not considered whether the Due Process Clause of the Montana Constitution provides a right of access to evidence distinct from its federal counterpart. Daniel R. Dinger, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood*, 27 Am.J.Crim.L. 329, n.126 (Montana is the lone state not to have ruled whether the *Youngblood* "bad faith" standard is applicable under its state constitution).

Consistent with the modern trend, this Court should join the fifteen states that have rejected *Youngblood* in favor of a balancing approach.[1] The states rejecting the *Youngblood* "bad faith" standard generally have adopted a multi-factor balancing test, such as that developed by the Delaware Supreme Court. Pursuant to this balancing test, the court employs a two-tiered analysis. First, the court considers:

> 1) would the material, if in the State's possession, have been subject to disclosure under state law or *Brady v. Maryland*, 373 U.S. 83 (1963)?
>
> 2) if so, did the government have a duty to gather or preserve the material?
>
> 3) if there was a duty to gather or preserve, was the duty breached, and what consequences should flow from a breach?

Hammond, 569 A.2d at 86; *see also*, *Bailey v. Delaware*, 521 A.2d 1069, 1090 (1987) (duty to gather as well as preserve).

[1] Fifteen states have rejected the *Youngblood* "bad faith" standard: *Ex Parte Gingo*, 605 So. 2d 1237 (Ala. 1992); *Thorne v. Department of Public Safety, State of Alaska*, 774 P.2d 1326, n.9 (Alaska 1989); *Connecticut v. Morales*, 657 A.2d 585 (Conn. 1995); *Hammond v. Delaware*, 569 A.2d 81 (Del. 1989); *Hawaii v. Matafeo*, 787 P.2d 671 (Haw. 1990); *Idaho v. Fain*, 774 P.2d 252 (Idaho 1989); *Massachusetts v. Henderson*, 582 N.E.2d 496 (Mass. 1991); *Minnesota v. Schmid*, 487 N.W.2d 539 (Minn. 1992); *New Hampshire v. Smagula*, 578 A.2d 1215 (N.H. 1990); *New Mexico v. Riggs*, 838 P.2d 975 (N.M. 1992); *Tennessee v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999); *Utah v. Tiedemann*, 162 P.3d 1106 (Utah 2007); *Vermont v. Delise*, 648 A.2d 632 (Vt. 1994); *Washington v. Stevenson*, 780 P.2d 873 (Wash. 1989); *West Virginia v. Osakalum*, 461 S.E.2d 504 (W. Va. 1995).

The consequences which should flow from a breach of the duty to gather or preserve evidence are determined in accordance with a separate three-part analysis which considers:

> 1) the degree of negligence or bad faith involved,
>
> 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and
>
> 3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Hammond, 569 A.2d at 86.

Once it has been established that the State must bear responsibility for the loss of material evidence, an appropriate jury instruction is required as a matter of due process. *Lolly v. Delaware*, 611 A.2d 956, 961 (Del. 1992). The Delaware Supreme Court has set forth the following jury instruction for use by the trial court:

> In this case the court has determined that the State failed to collect/preserve certain evidence which is material to the defense. The failure of the State to collect/preserve such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for purposes of deciding this case, you are to assume that the missing evidence, had it been collected/preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty. The inference does not necessarily establish the defendant's innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, you must weigh that evidence along with the inference. Nevertheless, despite the inference concerning missing evidence, if you conclude after examining all the evidence that the State has proven beyond a

reasonable doubt all elements of the offenses(s) charged, you would be justified in returning a verdict of guilty.

Lolly, 611 A.2d at 961, n. 6. In addition to a curative jury instruction, the district court has the latitude to employ an array of remedies, including suppression of evidence and dismissal. *Ferguson*, 2 S.W.3d at 917.

Applying the balancing test to the facts of the present case, this Court should require a missing evidence jury instruction as a matter of due process.

1. Pursuant to the Balancing Test, Gunderson Was Denied Due Process.

Pursuant to the six-factor balancing set forth in *Hammond*, Gunderson was denied due process. *Hammond*, 569 A.2d at 86.

a. The items were subject to disclosure.

The first factor considers whether the material, if in the State's possession, would have been subject to disclosure under Mont. Code Ann. §46-15-322 (2007) or *Brady*. *Hammond*, 569 A.2d at 86. In the present case, had the police collected the victim's underwear or obtained evidence to determine whether there was saliva on Randall's neck, the evidence as well as the results of any testing would have been subject to disclosure pursuant to Mont. Code Ann. §46-15-322.

b. There was a duty to collect the physical evidence.

The second factor considers whether the government had a duty to gather or preserve the material. *Hammond*, 569 A.2d at 86. In light of the ability of modern

forensics to detect trace evidence and in light of the allegation of kissing and forceful pulling of Randall's underwear, the State should have collected the victim's underwear and should have made reasonable efforts to determine the presence or absence of saliva on the victim's neck. Although the police should not be required to go to extraordinary lengths and certainly are not required to leave no stone unturned, the police should be required to make reasonable efforts to collect and preserve physical evidence. Such a requirement is sound policy because the costs are low and the benefit is high in that making reasonable efforts to collect the evidence requires nominal effort, but can provide critical, highly reliable evidence. Accordingly, this Court should either find there was a duty to make reasonable efforts to collect the victim's underwear and to determine the presence or absence of saliva or this Court should reverse and remand, with instructions for the trial court to hear evidence sufficient to apply the balancing test and determine the appropriate remedy.

c. The duty to make reasonable efforts to collect physical evidence was breached.

If there was a duty to gather or preserve, the third factor considers whether the duty was breached. *Hammond*, 569 A.2d at 86. Here, if there was a duty to collect Randall's underwear and/or make reasonable efforts to determine the presence or absence of saliva on the victim's neck, that duty was undeniably breached.

d. The state was negligent and showed a disregard for Gunderson's interests.

The fourth factor considers the degree of negligence or bad faith involved. *Hammond*, 569 A.2d at 86. Although there is no indication that the State acted in bad faith, it was negligent and in blatant disregard of Gunderson's interests not to collect the victim's underwear. If the underwear were not distressed, it would have refuted the alleged victim's allegation that Gunderson forcefully pulled on Randall's underwear. Likewise, it was negligent not to collect evidence (through a rape exam or otherwise) that could have established or refuted Randall's allegation that Gunderson kissed her neck. In light of the he-said-she-said nature of the State's case against Gunderson, the failure to collect the physical evidence was not merely negligent, but showed a disregard for Gunderson's interests.

e. In light of the posture of the case, evidence that could have impeached the alleged victim was critical.

The fifth factor considers the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available. *Hammond*, 569 A.2d at 86. The physical evidence in the present case was critical, reliable and irreplaceable. Had Randall's underwear not been distressed and/or had saliva not been detected, key elements of Randall's story would have been refuted and Gunderson's explanation would have been corroborated. In light of the fact that Gunderson's convictions hinged on a

credibility duel, the physical evidence is not merely exculpatory, it was vital to Gunderson's defense. Moreover, when the police failed to collect evidence that could have established or refuted the presence of saliva, the evidence was forever lost and secondary or substitute evidence was not available.

f. The sufficiency of the other evidence.

The sixth factor considers the sufficiency of the other evidence produced at the trial to sustain the conviction. *Hammond*, 569 A.2d at 86. Critical elements of both the alleged robbery and the alleged attempted SIWC were based on Randall's uncorroborated testimony. The uncorroborated testimony of the alleged victim--though legally sufficient--obviously does not have the reliability of scientific testing. In the present case, the prejudice caused by the negligence was exponentially increased because of the paucity and unreliability of the other evidence. The failure to collect physical evidence unnecessarily forced Gunderson into a credibility duel when the alleged sexual contact (*i.e.*, kissing and forcefully pulling on underwear) could have been scientifically established or refuted.

2. This Court Should Require a Missing Evidence Jury Instruction.

In light of the degree of negligence and the prejudice caused, the appropriate remedy in the present case is a missing evidence jury instruction requiring the jury to infer the missing evidence would have exculpated Gunderson.

V. COMMENTS OF A PROSPECTIVE JUROR INDICATING THAT GUNDERSON HAD BEEN IN JAIL REQUIRED A MISTRIAL.

Gunderson argued during jury selection and in his motion for a new trial that information that one of the prospective jurors was a county jailor and was familiar with Gunderson prejudiced Gunderson's right to a fair trial by creating the impression in the jurors' minds that Gunderson "must be some type of trouble maker." (D.C.Doc. 67 at 8.) The inference of Gunderson's incarceration arising from the prospective juror's comments is akin to the due process violation arising from the jury seeing a defendant in shackles or prison attire at trial. *See e.g.*, *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (prison attire); *State v. Merrill*, 2008 MT 143, ¶12, 343 Mont. 130, 183 P.3d 56 (shackles). Accordingly, it was error to deny Gunderson's motion for a mistrial.

VI. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO REMOVE A PROSPECTIVE JUROR FOR CAUSE AFTER SHE INDICATED BIAS AGAINST THE ACCUSED.

In *State v. Braunreiter*, 2008 MT 197, 344 Mont. 59, 185 P.3d 1024, this Court reversed a conviction where a prospective juror stated during *voir dire* that "[the defendant] has been charged. He has to prove he didn't do it." *Braunreiter*, ¶13. The Court held that this and other statements "reveal the kind of fixed state of mind that this Court repeatedly has deemed appropriate for a dismissal for cause." *Braunreiter*, ¶21. Even in the absence of contemporaneous objections, this Court may discretionarily review errors implicating fundamental constitutional rights

under the plain error doctrine. *State v. Daniels*, 2003 MT 247, ¶20, 317 Mont. 331, 77 P.3d 224.

Here, prospective juror Jensen indicated that in her mind charging documents are evidence. (Trial at 78.) In response to defense counsel's inquiry that "it sounds like you've already decided that he's probably guilty simply because he's sitting there and he's charged," prospective juror Jensen replied, "I'd say I'd probably have more of a bias that he is simply because he's charged." (Trial at 78.) Jensen said that although she would try not to let it affect her, "there's a little bias there." (Trial at 79.) Although defense counsel did not challenge Jensen for cause, it was plain error not to remove Jensen for cause following these statements of bias towards Gunderson.

VII. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DECLINED TO GIVE AN INSTRUCTION THAT A DEFENDANT'S TESTIMONY SHOULD BE TREATED THE SAME AS ANY OTHER WITNESS.

Defense counsel sought a jury instruction based upon a Ninth Circuit model criminal jury instruction indicating that "The defendant has testified. You should treat this testimony just as you would the testimony of any other witness." (D.C.Doc. 58.) Defense counsel argued that such an instruction was necessary to offset a given instruction indicating that the jurors may consider whether witnesses have interests in the case's outcome. (5/23/08 Tr. at 2-3; Trial at 452; D.C.Doc. 67 at 2-3.) The offered instruction was based on Ninth Circuit Model Criminal Jury

Instruction 3.4. The lack of such an instruction prejudiced Gunderson and improperly shifted the burden because the given instructions indicated to the jury that he was less worthy of belief than other witness because he had the greatest interest in the case's outcome.

VIII. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT GAVE THE JURY DISJUNCTIVE DEFINITIONS OF "PURPOSELY" AND "KNOWINGLY" THAT DEFINED THE TERMS AS RELATING EITHER TO CONDUCT OR TO RESULT.

This Court held in *Patton* that a district court erred in instructing the jury regarding a deliberate homicide charge that "[a] person acts purposely when it is his conscious object to engage in conduct of that nature or to cause such a result." *State v. Patton*, 280 Mont. 278, 290-91, 930 P.2d 635, 642-43 (1996). This Court explained that the "purposely" instruction in *Patton* was error because it "defined 'purposely' in an either-or-fashion, and allowed the jury to convict Patton solely on the basis that he consciously engaged in conduct without regard to whether harm was intended." *Patton*, 280 Mont. at 291, 930 P.2d at 643; *see also*, *State v. Lambert*, 280 Mont. 231, 237, 929 P.2d 846, 850 (1996); *State v. Rothacher*, 272 Mont. 303, 307-08, 901 P.2d 82, 85-86 (1995).

In the present case, both the "purposely" and the "knowingly" definitions given to the jury were disjunctive statements indicating that the terms could refer either to conduct or to result. (D.C.Doc. 59, Instrs. 16, 21.) These disjunctive definitions relieved the State from having to prove every element of the offenses

and therefore, pursuant to the plain error doctrine, this Court should reverse and remand.

IX. THE DISTRICT COURT IMPOSED AN ILLEGAL SENTENCE WHEN IT IMPOSED FIFTY-ONE CONDITIONS ON GUNDERSON.

At the conclusion of sentencing the district court stated, "I will also incorporate provisions 1 through 50 that are the conditions at the end of the presentence investigation report." (6/16/08 Tr. at 26.) The written judgment states, "IT IS FURTHER ORDERED that the following provisions that are conditions at the end of the presentence investigation report are imposed:" and then lists fifty-one conditions relating to supervision by a "Probation & Parole Officer." (D.C.Doc. 86 at 3-7.) The presentence investigation report introduced the conditions with the statement, "If there is ever a period of community supervision the following conditions of probation shall apply." (D.C.Doc. 84 at 10.) Gunderson was sentenced to life plus one hundred years in prison without the possibility of parole. (D.C.Doc. 84 at 1-2.)

This Court has held that a sentencing court has no general power to impose parole conditions, although a sentencing court may impose certain employment and contact conditions on sexual or violent offenders. *State v. Dennison*, 2008 MT 344, ¶¶12-15, 346 Mont. 295, 194 P.3d 704; *State v. Burch*, 2008 MT 11, ¶¶14-31, 342 Mont. 499, 182 P.3d 66; *see also*, Mont. Code Ann. §46-18-255. If this Court were to interpret the fifty-one "conditions" in Gunderson's written judgment as

parole conditions rather than as probation conditions or meaningless appendages to Gunderson's no parole sentences, most of them would be illegal under the holdings in *Dennison* and *Burch*. *See also*, *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979) (allowing appellate review of illegal sentences even without a contemporaneous objection). Moreover, even if the conditions are probation conditions, the district court was without authority to impose them because no portion of Gunderson's sentence was suspended. *Cf. State v. Letasky*, 2007 MT 51, ¶15, 336 Mont. 178, 152 P.3d 1288 ("A condition of a suspended sentence would be meaningless without reference to the independent mandate, specifically, the order of suspended sentence, that it conditions."). Accordingly, the fifty-one conditions are illegal and should be stricken.

CONCLUSION

For the reasons stated herein, this Court should dismiss or reduce Gunderson's conviction for attempted SIWC and should reverse and remand, requiring such further actions as are warranted by this Court's decision.

Respectfully submitted this ____ day of November, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

TARYN STAMPFL HART

APPENDIX